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Comment on Docket #17-108
"Restoring Internet Freedom" (sic)

To the Honorable Commission:

I hear a lot about these "light-touch" regulations. They are completely wrong. The FCC was not created to be an ineffective "light-touch" agency. It was formed to act as a counterweight to the Ma Bell monopoly.

Many Americans have only one or two choices for robust high-speed access, leading to the very monopoly or duopoly conditions the FCC was invented to robustly regulate.

I've enclosed an excerpt from *Cable Mergers and Monopolies* by Mark Cooper of the Economic Policy Institute. It describes better than I can the pain that cable traffic "discrimination" causes. (See <http://cyberlaw.stanford.edu/attachments/Cable_mergers.pdf>)

Repealing the *Open Internet Order* in favor of these industry-friendly "light-touch" regulations is venally protecting the interests (pecuniary and otherwise) of Commissioner Pai's former employer Verizon, and other telecom conglomerates who have fought tooth and nail to prevent "net neutrality."

If you don't want to use your Title II authority to regulate the telecommunications behemoths it is your duty to regulate, I'd humbly suggest you resign and go back to your jobs at the very same firms you are supposedly "regulating."

"Light touch" means a *de facto*, if not *de jure*, dereliction of duty.

Speaking of "light touch," a "light touch" firefighter just sits in the truck and plays solitaire while the town burns to the ground.

Is that why you joined the FCC? To play solitaire?

Anything less than Title II regulation is, in my opinion, indefensible. The FCC should stick to investigating late-night comics who make fun of your boss.

Cordially,

Mr. BRYANT MAQUARIE

> with all others, even those who use different service providers...It would have been a disaster for the Internet if e-mail had been held captive to a proprietary technology so that users of one e-mail system could not communicate with e-mail users of a different system or if one company could dictate the terms by which all other companies could use e-mail. Instant messaging must be subject to the same principle.[315]

AOL also believed that the presence of alternative facilities did not eliminate the need for open access; it argued that

> [an open access requirement] would allow ISPs to choose between the first-mile facilities of telephone and cable operators based on their relative price, performance, and features. This would spur the loop-to-loop, facilities-based competition contemplated by the Telecommunications Act of 1996, thereby offering consumers more widespread availability of Internet access; increasing affordability due to downward pressures on prices; and a menu of service options varying in price, speed, reliability, content and customer service.[316]

Discrimination

It is hard to imagine that private entities possessing this market power would refrain from using it to their advantage, and in fact, proprietary control of the physical facilities has not led to open networks. There was never any reason to expect otherwise, as AT&T foresaw. In Canada, AT&T tied the domination of access over the last mile to proprietary standards.[317] As concern over this advantage has grown, analysts have identified two distinct types of discrimination. Vertically integrated broadband providers may practice content discrimination or conduit discrimination.[318]

Content discrimination has been the focal point of concern for high-speed Internet services. Content discrimination involves an integrated provider "insulating its own affiliated content from competition by blocking or degrading the quality of outside content."[319]

> Content discrimination... would benefit the cable provider by enhancing the position of its affiliated content providers in the national market by denying unaffiliated content providers critical operating scale and insulating affiliated content providers from competition. Content discrimination would thus allow the vertically integrated content provider to earn extra revenues from its own portal customers who would have fewer opportunities to interact with competing outside content.[320]

AT&T identifies four forms of anticompetitive practices – bundling, price squeeze, service quality discrimination, and first-mover advantage. It describes the classic vertical leveraging tools of price squeezes and quality discrimination as content discrimination.[321]

Even after AT&T became the nation's largest cable TV company, it criticized local telephone companies for abusing their monopoly control over their telephone wires. AT&T complained about bottleneck facilities, vertical integration, anticompetitive bundling of services, and distortion of competition when it opposed the entry of SBC into the long-distance market in Texas. These are the very same complaints AOL made about AT&T at about the same time.[322] AOL expressed related concerns about the manipulation of technology and interfaces:

> … allowing a single entity to abuse its control over the development of technical solutions – particularly when it may have interests inconsistent with the successful implementation of open access – could indeed undermine the City's policy. It is therefore vital to ensure that unaffiliated ISPs can gain access comparable to that the cable operators choose to afford to its cable-affiliated ISP.[323]

Long-distance companies and competitive local exchange carriers have similar concerns about merging local exchange carriers. As their experts argued in the proposed SBC/Ameritech and Bell Atlantic/GTE mergers:

> These mergers will have competition in local exchange, inter-exchange, and combined-service markets due to footprint effects. The economic logic of competitive spillovers implies that the increase in [the incumbent local exchange carrier (ILEC)] footprints resulting from these proposed mergers would increase the ILECs' incentive to disadvantage rivals by degrading access services they need to compete, thereby harming competition and consumers.[324]

The experts for the local telephone companies identified a series of tactics that a vertically integrated broadband provider could use to put competing, unaffiliated content providers at a disadvantage.

> First, it can give preference to an affiliated content provider by caching its content locally… Such preferential treatment ensures that affiliated content can be delivered at faster speed than unaffiliated content. Second, a vertically integrated broadband provider can limit the duration of

> streaming videos of broadcast quality to such an extent that they can never compete against cable program-ming...Third, a vertically integrated firm such as AT&T or AOL-Time Warner could impose proprietary standards that would render unaffiliated content useless...Once the AT&T standard has been established, AT&T will be able to exercise market power over customers and those companies trying to reach its customers.[325]

Wall Street analysts point out that the key to controlling the supply side is controlling essential functions through proprietary standards.[326] Independent ISPs point out that cable operators like AOL use control over functionalities to control the services available on the network.[327] Cable operators have continued to insist on quality of service restrictions by unaffiliated ISPs, which places the ISPs at a competitive disadvantage.[328] Cable operators must approve new functionalities whether or not they place any demands on the network.[329] AT&T's control of the architecture is just as explicit. It will pick and choose which service providers get the fastest speeds. The favored service providers are those affiliated with AT&T.[330]

Conduit discrimination has received less attention in the high-speed Internet area. Nevertheless, there are such examples in this Internet market. In implementing conduit discrimination, the vertically integrated company would refuse to distribute its affiliated content over competing transmission media.[331] In doing so, it seeks to drive consumers to its transmission media and to weaken its rival. This is profitable as long as the revenue gained by attracting new subscribers exceeds the revenue lost by not making the content available to the rival. AT&T has been accused of conduit discrimination in the high-speed Internet market.

> CTN [CT Communications Network Inc.], a registered and franchised cable operator, has been unable to purchase the affiliated HITS transport service from AT&T Broadband, the nation's largest cable operators, despite repeated attempts to do so.... Based on its own experience and conversations with other companies who have experienced similar problems, CTCN believes that AT&T is refusing to sell HITS to any company using DSL technology to deliver video services over existing phone lines because such companies would directly compete with AT&T entry into the local telephone market using both its owns system and the cable plant of unaffiliated cable operators. AT&T simply does not want any terrestrial based competition by other broadband networks capable of providing bundled video, voice and data services.[332]

The AOL/Time Warner merger raised similar concerns about conduit discrimination. The significance of the AOL switch to cable-based broadband cannot be underestimated in the damage that it does to the hoped-for competition between cable modems and DSL. Although the telephone companies are reluctant to admit that their technology will have trouble competing, their experts have identified the advantages that cable enjoys.[333] Fearing that once AOL became a cable owner it would abandon the DSL distribution channel, the FTC required AOL to continue to makes its service available over the DSL conduit.

Bundling and Customer Lock-In

Bundling early in the adoption cycle to lock in customers is the focal point of the leveraging strategy followed by facility owners. AT&T described the problem with the bundling technique that local telephone companies (local exchange carriers or LECs) might use to gain an advantage.[334] AOL described the threat of vertically integrated cable companies in the United States in these terms:

> At every link in the broadband distribution chain for video/voice/data services, AT&T would possess the ability and the incentive to limit consumer choice. Whether through its exclusive control of the [EPG define] or browser that serves as consumers' interface; its integration of favored Microsoft operating systems in set-top boxes; its control of the cable broadband pipe itself; its exclusive dealing with its own proprietary cable ISPs; or the required use of its "backbone" long distance facilities; AT&T could block or choke off consumers' ability to choose among the access, Internet services, and integrated services of their choice. Eliminating customer choice will diminish innovation, increase prices, and chill consumer demand; thereby slowing the rollout of integrated service.[335]

Once AT&T became the largest vertically integrated cable company selling broadband access in the United States, it set out to prevent potential competitors from offering bundles of services. Bundles could be broken up either by not allowing Internet service providers to have access to video customers, or by preventing companies with the ability to deliver telephony from having access to high-speed content.

AOL argued that requiring open access early in the process of market development would establish a much stronger structure for a pro-consumer, pro-competitive market. Early intervention prevents the architecture of the market from blocking openness and avoids the difficult task of having to reconstruct an open market at a later time. AOL did not hesitate to point out the powerful anticompetitive effect that integrating video services in the communications bundle could have. AOL argued that, as a result of a vertical merger,

> ... AT&T would take an enormous next step toward its ability to deny consumers a choice among competing providers of integrated voice/video/ data offerings – a communications marketplace that integrates, and transcends, an array of communications services and markets previously viewed as distinct.[336]

Wall Street sees the first-mover advantage both in the general terms of the processes that affect network industries and in the specific advantage that cable broadband services have in capturing the most attractive early adopting consumers.[337] First-mover advantages have their greatest value when consumers have difficulty switching from or substituting something else for the dominant product. Several characteristics of broadband Internet access are conducive to company's gaining the first-mover advantage, or "lock-in."

The local telephone company experts outlined a series of concerns about lock in.[338] First, high-speed access is a unique product. The Department of Justice determined that the broadband Internet market is a separate and distinct market from the narrowband Internet market.[339] Once this obvious economic fact is accepted, the severe concentration in the broadband market – resulting in a high degree of market power – and the blatantly anticompetitive effect of the exclusionary tactics of the dominant broadband firms become apparent, even to AT&T.[340]

The local telephone company experts devote a great deal of attention to demonstrating that the broadband market is a distinct market.[341] There is no doubt that "high-speed seems to be a distinctive product, making it a credible wedge for cable to sell a broader bundle."[342] For the Wall Street analysts, bundling is the central marketing strategy for broadband.[343]

Second, there are significant switching costs that will hinder competition. The equipment (modems) and other front-end costs are still substantial and unique to each technology. Thus, switching costs remain a substantial barrier to competition. A head start combined with significant switching costs raises the fear among the independent ISPs that consumers will be locked in. In Canada, AT&T argued that the presence of switching costs could impede the ability of consumers to change technologies, thereby impeding competition.

> [T]he cost of switching suppliers is another important factor that is used to assess demand conditions in the relevant market. In the case of the broadband access market, the cost of switching suppliers could be significant, particularly if there is a need to adopt different technical interfaces or to purchase new equipment for the home or office. Given the fact that many of the technologies involved in the provision of broadband access services are still in the early stages of development, it is unlikely that we will see customer switching seamlessly from one service provider to another in the near-term.[344]

The emerging model for closed communications platforms is one in which the facility owner with a dominant technology that is a critical input for service delivery can use control of transmission facilities to dominate content services. With proprietary control over a network that lacks adequate alternatives, facility owners can lock in consumers and squeeze competitors out of the broader market. Lock-in occurs because the high-speed access is a distinct market for a product with significant switching costs.